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No. 04-582

IN THE
Supreme Court of the United States

RUI ONE CORPORATION,
Petitioner,
v.
CITY OF BERKELEY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioner. Counsel for Petitioner has consented to the filing of this brief, as has counsel for Respondent City of Berkeley. Counsel for Respondent Hotel Employees & Restaurant Employees Local 2850 declined to consent, thereby necessitating the filing of this motion.

WLF is a non-profit public interest law and policy center with supporters in all 50 states, including many in California. WLF regularly appears before federal and state courts to

promote economic liberty, free enterprise, and a limited and accountable government.

In particular, WLF has devoted substantial resources over the years to protecting the property rights and contractual rights of private citizens. *See, e.g., Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003); *McQueen v. South Carolina Coastal Council*, 354 S.C. 142, *cert. denied*, 124 S. Ct. 466 (2003); *General Motors Corp. v. Romein*, 503 U.S. 181 (1992).

WLF fully supports Petitioner's request that the Court grant review of both of the Questions Presented in this Petition. WLF writes separately in order to emphasize its particular concern over the second Question Presented and the Ninth Circuit's apparent willingness to tolerate legal regimes that unquestionably frustrate the reasonable expectations of those who enter into contracts with municipalities. WLF is concerned that the decision below provides an easy roadmap to any government agency seeking methods of obtaining from government contractors concessions that it is unable to obtain during the contract bargaining process.

WLF is filing this brief because of its interest in promoting the welfare of the business community and the public at large; it has no interest, financial or other, in the outcome of this lawsuit. Because of its lack of direct economic interests, WLF believes that it can assist the Court by providing a perspective that is distinct from that of any party.

For the foregoing reasons, the Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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December 1, 2004

QUESTION PRESENTED

Amicus curiae addresses the following issue only:

Whether the City of Berkeley's narrowly targeted amendment of its "living wage" ordinance violates the Contract Clause because that amendment imposes significant new contractual obligations upon Petitioner that Berkeley had failed to secure in recent renegotiations of its lease with Petitioner.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation (WLF) are set forth in the motion accompanying this brief.[1]

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

STATEMENT OF THE CASE

This case tests whether the Constitution imposes restraints on the power of a municipality to impose on one of its lessees substantial financial obligations that are in addition to those bargained for under the lease.

Petitioner RUI One Corporation ("RUI") operates a restaurant and lounge in Berkeley, California in an area known as the Berkeley Marina. RUI's restaurant sits on land owned by Respondent City of Berkeley; RUI occupies the land pursuant to a long-term lease whose 50-year term does not expire until 2017. The lease requires RUI to construct and maintain "a major first-class restaurant and cocktail lounge" at the site and to pay rent. The lease initially set annual rent payments at the greater of $11,400 or 2.5% of the restaurant's annual gross receipts. The lease was renegotiated in 1996 to increase that percentage to 3.0% and eventually (starting in 2007) to 3.3%. During the 1996 renegotiation, RUI also acceded to Berkeley's requests to install a grease trap (at RUI's expense) and to pay for new landscaping. Berkeley did not seek during the 1996 renegotiation to add any lease provisions dealing with employee pay or benefits. The lease prohibited RUI from discriminating with regard to "rates of pay or other forms of compensation."

In June 2004, Berkeley adopted its first "living wage" ordinance (the "LWO"). The LWO required companies entering into new leases or contracts with the City to agree to provide their employees a minimum wage and benefits package that was far higher than minimum wages imposed under federal and California law. The LWO further provided that companies that had entered into collective bargaining agreements with their employees could be excepted from the LWO's requirements. Because the LWO applied

prospectively only (*i.e.*, only to those companies entering into *new* leases or contracts), it had no effect on RUI's lease.

The Hotel Employees & Restaurant Employees Union Local 2850 soon thereafter began lobbying the Berkeley City Council to expand the scope of the LWO to provide retrospective coverage for several large hotel/restaurant employers (including RUI) that leased land from Berkeley on the Marina. In response, Berkeley amended the LWO in October 2000 (the "Marina Amendment"). The Marina Amendment expanded coverage of the LWO to include large, non-union employers located at the Marina; unlike the LWO, the Marina Amendment applied retroactively to existing lessees. Ultimately, RUI was the *only* company affected by the Marina Amendment, because the one or two other companies that might have been affected were unionized and thus exempted. Although RUI introduced substantial evidence that the Marina Amendment was adopted explicitly to target RUI and to punish it for being a non-union company, the lower courts deemed that factual issue irrelevant to the legal issues before it and thus made no factual findings on the issue. Pet. App. 12a-13a n.7. RUI has estimated the additional costs imposed on it by the Marina Amendment at $121,000 per year.

In October 2000, RUI filed suit in federal district court, alleging *inter alia* that the Marina Amendment violated its rights under the Contract Clause, U.S. Const., art. I, § 10, cl. 1; and the Fourteenth Amendment's Equal Protection Clause. In March 2002, the district court denied RUI's motion for summary judgment and granted summary judgment to Berkeley. Pet. App. 67a-84a.

In June 2004, the Ninth Circuit affirmed by a 2-1 vote. *Id.* 1a-66a. The majority denied RUI's Contract Clause claim, *id.* 14a-28a, finding that RUI had "failed to show that any

provision of its lease agreement with the City was impaired, much less substantially impaired, by the Marina Agreement." *Id.* 27a. The majority held not only that the lease could not reasonably be interpreted as preventing Berkeley from mandating increased wage and benefit payments during the lease term, but also that "such a contract term would be void as against public policy" because "'the legislature cannot bargain away the police power of a State.'" *Id.* at 19a (quoting *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 23 (1977)). While acknowledging that courts apply decreased deference to government acts when hearing Contract Clause claims if the government itself is one of the contracting parties, the majority held that that decreased deference is inapplicable in determining whether a contract right has been substantially impaired: "The government's supposed self-interest is simply not relevant to the factual determinations prerequisite to a finding on this threshold issue -- formation, terms and impairment." *Id.* 25a. The majority also upheld the rejection of RUI's equal protection claim. *Id.* 28a-33a.

Judge Bybee dissented, finding that the Marina Amendment violated RUI's rights under the Contract Clause. *Id.* 36a-66a. As he read the RUI lease, "Berkeley promised not to impose unilaterally higher wage and benefit costs on RUI." *Id.* 44a. He found, "Berkeley's tacit recognition that it could not alter the terms of existing leases was evident in its applying the original LWO to prospective leases only." *Id.* 45a. He would have held that "the Contract Clause protects such implied contractual terms." *Id.* Rejecting the majority's contrary conclusion, he stated, "Under the principle adopted by the majority, there is no end to the terms that Berkeley might legislatively rewrite, so long as they are not covered by 'specific terms' in the lease." *Id.* 47a. Judge Bybee went on to hold that the Marina Amendment's impairment of RUI's lease was "substantial," *id.* 52a; that the Amendment could not

be justified as "a valid exercise of police power" because it was neither generally nor prospectively applicable, *id.* 55a; and that the Amendment did not serve a significant and legitimate public purpose. *Id.* 56a-63a.

REASONS FOR GRANTING THE PETITION

This case raises Contract Clause issues of exceptional importance. As Judge Bybee noted, and the Ninth Circuit majority did not seriously dispute, "Berkeley used its sovereign authority to achieve what it failed to negotiate in its proprietary capacity." *Id.* 46a. The majority found nothing constitutionally problematic in Berkeley's behavior; it viewed Berkeley's conduct as justified by its police-power authority to protect workers within the city by regulating employment relationships. Indeed, no one seriously disputes Berkeley's power to adopt a generally applicable "living wage" law. But the issue here is whether such police powers permit a city to adopt an ordinance imposing vastly higher wage scales on a single employer, particularly when, as here, the city's hook for imposing the ordinance is that it has an existing contractual relationship with the employer yet it failed to seek the higher wages as part of the contractual bargaining process.

Review is warranted because the Ninth Circuit's ruling goes to the heart of the long-simmering debate over whether the Contract Clause has a meaningful role to play in protecting economic liberty in this nation. The Ninth Circuit's ruling places that court in the camp of those who view most efforts to enforce the Contract Clause with suspicion, as an effort to revive the *Lochner* era's substantive due process protection of economic rights. Those sharing that view argue strenuously that the Contract Clause's prohibition on contract impairments "must be accommodated to the inherent police power of the State to safeguard the vital interests of its people." *Energy*

Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 410 (1983).[2]

Those who support more muscular enforcement of Contract Clause fully agree that contractual rights must give way in appropriate circumstances to the government's need to protect the public. *See, e.g.*, Richard A. Epstein, "Toward a Revitalization of the Contract Clause," 51 U. CHI. L. REV. 703 (1984). But the danger posed by decisions such as the Ninth Circuit's decision is that they could soon render the Contract Clause a dead letter. By upholding Berkeley's conduct in this case, the Ninth Circuit has essentially provided a government agency with an easy-to-follow roadmap for obtaining from individual government contractors concessions that it did not obtain during the contract bargaining process. By eliminating any requirement that police powers be exercised through adoption of generally applicable ordinances and by narrowly construing what constitutes a contract impairment, the Ninth Circuit has largely deprived government contractors of the ability to bargain for contract terms that protect them from the vagaries of shifting public policy.

Review is also warranted because the decision below conflicts with this Court's case law. In particular, the decision conflicts with this Court's repeated admonitions in Contract Clause cases that government regulations are to be treated less deferentially when the regulations are alleged to impair rights arising from a contract to which (as here) the government is a party. The decision also conflicts with this Court's understanding of what constitutes a contract impairment.

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[2] The Contract Clause provides: "No State shall * * * pass any * * * Law impairing the Obligation of Contracts." U.S. Const., art. I, § 10, cl. 1.

I. REVIEW IS WARRANTED BECAUSE THE CASE PROVIDES AN EXCELLENT VEHICLE FOR RE-EXAMINING THE ROLE OF THE CONTRACT CLAUSE IN PROTECTING ECONOMIC RIGHTS

WLF fully supports RUI's effort to obtain review on both of the Questions Presented by the Petition. RUI has ably demonstrated that the Ninth Circuit's approach to class-of-one equal protection claims sharply conflicts with the approach of other circuits and that resolution of that conflict is appropriate. It has also demonstrated that the Ninth Circuit's approach is inconsistent with this Court's decision in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).

WLF nonetheless focuses this brief solely on the Contract Clause issue because it believes both that cases of this sort are most appropriately resolved under the Contract Clause and because this case is a particularly suitable vehicle for exploring the continued role of the Contract Clause in protecting economic rights. When the government establishes rules that apply only to one person or a very small group of people, and there is evidence suggesting that the government has employed improper criteria in singling out the person or persons, rights arising under the Equal Protection Clause undoubtedly come into play. But where, as here, the person singled out alleges that the government rules impair his contractual rights, the Contract Clause speaks to the issue with much more specificity than does the Equal Protection Clause. Because the two clauses are intended to protect similar interests (in general, to protect individuals from arbitrary treatment at the hands of state government), it makes more sense, whenever possible, initially to analyze claims involving alleged impairment of contract rights under the constitutional provision that more directly addresses such issues. *See, e.g.*, Robert Bork,

"Neutral Principles and Some First Amendment Problems," 47 IND. L.J. 1, 17 (1971).

Review of the Contract Clause issue is warranted because the case presents a particularly suitable vehicle for exploring a number of frequently recurring and unresolved Contract Clause issues. The facts of the case are largely undisputed; the Ninth Circuit's majority and dissenting opinions were largely in agreement regarding the underlying facts and diverged only with respect to the legal conclusions to be drawn from those facts.

A major focus of the disagreement between the majority and dissent was how courts should determine, in Contract Clause cases, whether there is even a contractual relationship that has been impaired. This Court has suggested that in Contract Clause cases "normally" the existence of a contractual relationship and the impairment of that relationship "are unproblematic" – that is, the plaintiff will have little difficulty making those showings. *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). But as both *Romein* and this case well illustrate, even when there is no doubt that a contract exists, the existence of a contractual agreement regarding relevant issues has almost always been contested in recent Contract Clause cases.

The crux of the disagreement among the appeals court judges generally centered on how readily federal courts ought to be willing, for Contract Clause purposes, to discern the existence of "implied" contract terms where no contract term explicitly addresses an issue. The Ninth Circuit majority was extremely reluctant to recognize "implied" contract terms. It stated, "Because the lease agreement contains an integration clause, the lease represents the parties' entire agreement, and there can be no implied terms." Pet. App. 17a.. Later in its

opinion, the majority relented only slightly from that position, stating that although "implied contractual terms can form the basis for a Contract Clause claim," in order for a court to recognize such a claim "'the contracting parties [must] . . . manifest[] assent' to such a term, and such a term must be 'so central to the bargained for exchange between the parties, or to the enforceability of the contract as a whole, that it must be deemed to be a term of the contract.'" *Id.* 18a (quoting *Romein*, 503 U.S. at 188-89). In contrast, the dissent was far more willing to imply contract terms. The dissent began its analysis of the issue by noting a "general principle of contracts that the agreement between the parties is contained within the four corners of the document." *Id.* 42a. Based on that principle, the dissent concluded that when the government is a party to a contract and could have – but did not – negotiate for imposition of additional financial burdens on the opposing party, it should be implied that the parties agreed that the government would not later seek to impose those burden during the term of the lease. *Id.* Applying those differing approaches, the majority and dissent arrived at diametrically opposed conclusions regarding whether Berkeley and RUI had a contractual agreement that Berkeley would seek to impose new costs on RUI only through the contract renegotiation process.

Whether an agreement constitutes a contract for purposes of Contract Clause analysis is a question of federal law. *Romein,* 503 U.S. at 187. This Court has provided little guidance on that issue, and the effects of that lack of guidance are readily apparent in the wildly differing conclusions that appeals court judges reached regarding the scope of RUI's and Berkeley's contractual agreement – even though the agreement is reduced to a written documents whose words are not disputed. Under those circumstances, this case would be a particularly appropriate vehicle for the Court to provide badly

needed guidance regarding when "a contractual relationship" can be deemed to exist for Contract Clause purposes.

This case also would afford the Court an opportunity to provide guidance on another issue that has perplexed the lower courts: what degree of deference is due a legislative determination that a regulation is appropriate? This Court has displayed far less deference when the governmental unit alleged to have impaired a contract is itself a party to that contract. Under those circumstances, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *United States Trust Co.*, 431 U.S. at 26.

However, the Ninth Circuit held that the stricter standard of *United States Trust Co.* was inapplicable here – despite the fact that Berkeley is a party to the RUI lease – because it was able to dispose of this case at the first stage of the Contract Clause analysis (whether the Marina Amendment operates as a substantial impairment of a contractual relationship). *See* Pet. App. 25a ("The government's supposed self-interest is simply not relevant to the factual determinations prerequisite to a finding on this threshold issue – formation, terms, and impairment."). Nothing in this Court's case law supports the Ninth Circuit's decision not to apply the stricter *United States Trust Co.* standard to all phases of its Contract Clause analysis. The Ninth Circuit based that decision on its belief that any government self-interest would have no effect on issues relevant to the "substantial impairment" determination. *Id.* But there is no obvious reason why that should be so.

Indeed, the facts of this case should give anyone pause before he/she categorically asserts that government self-interest is irrelevant to the "substantial impairment" determination. The Marina Amendment adopted by Berkeley

imposed substantial financial obligations on RUI *and on no one else.* Those obligations were imposed based solely on RUI's status as a Marina lessee. It unquestionably is in Berkeley's self-interest to provide the courts with a one-sided account of events leading up to execution of the RUI lease, in order to minimize the possibility that the courts will determine that the parties reached an agreement on an issue relevant to RUI's Contract Clause claim. It is also in Berkeley's self-interest to assert (as it did) that it should not be deemed to have agreed not to impose an increased minimum wage during the term of the RUI lease because any such agreement would violate public policy against bargaining away police powers. Pet. App. 19a. Under those circumstances, it makes little sense to do as the Ninth Circuit did and grant deference to Berkeley's actions with respect to formation, terms, and impairment of the contract. At the very least, it would be appropriate for the Court to grant review in order to provide guidance to the lower courts on this issue.

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS

Review of the Contract Clause issue is warranted for the additional reason that the Ninth Circuit's decision is in direct conflict with a number of this Court's Contract Clause decisions. In particular, the manner in which the Ninth Circuit went about determining the parties' contractual understandings cannot be squared with this Court's recent decisions as well as the decision of at least one other appeals court.

Judge Bybee in dissent concluded that the parties had made clear by their course of dealing that they intended the lease to reflect all costs that would be imposed on RUI by Berkeley in connection with its Marina lease. In support of

that conclusion, he pointed to cost items that were the subject of the 1996 lease renegotiation, such as the increased rental payments, $50,000 RUI was required to spend on a grease trap, and the $7,000 RUI was required to spend on landscaping. Pet. App. 43a-44a. Based on that history of negotiations and the lease's silence on the question of RUI's wages and benefits (other than the lease's requirement that RUI comply with Berkeley's nondiscrimination policies), Judge Bybee concluded:

> The fact that the lease, which constitutes the entire agreement between the parties, does not set employee wages and benefits necessarily implies that the parties agreed not to contract on wages and benefits.

Id. 44a.

As noted above, the majority responded by invoking a diametrically opposed method of contract interpretation. The majority stated, "Because the lease agreement contains an integration clause, the lease represents the parties' entire agreement, and there can be no implied terms." *Id.* 17a. It asserted later that no contract term can be implied unless the contracting parties have manifested their assent to the term, and that RUI had not shown "how Berkeley manifested it assent" to any implied contract terms. *Id.* 18a.

It is the dissent's approach to contract interpretation that is far truer to the approach this Court has taken in past Contract Clause cases. For example, in determining whether government regulation substantially impairs any contract rights, the Court has "consider[ed] whether the industry the complaining party has entered has been regulated in the past." *Energy Reserve Group*, 459 U.S. at 411 (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 n.13

(1978)). *See also Lipscomb v. Columbus Municipal Separate School District*, 269 F.3d 494, 504 (5th Cir. 2001) ("In considering whether an impairment to contract is substantial, the court should consider the expectation of the parties with respect to changes in the law. Particularly relevant to this inquiry is whether the subject matter of the contracts had been subject to regulation at the time the contracts were made.").

The approach of the Ninth Circuit majority is inconsistent with *Energy Reserve Group*. Under that decision, it is highly relevant that, prior to 2000, Berkeley had never before imposed any minimum wage and benefit requirements on its lessees and contractors. As of 1996, RUI had every reason to believe that Berkeley would not impose such requirements and had agreed through its course of dealing not to seek to impose additional costs on RUI except through the lease renegotiation process. The majority faults RUI for having failed to insist on a lease term that explicitly prohibited new minimum wage and benefits requirements without a corresponding decrease in rent. But under that theory of contract interpretation, no government contractor could ever fully protect itself. No matter how lengthy a lease, there will always be some items omitted; and under the majority's analysis a government will always be in a position to frustrate a contractor's desire for predictable costs by adopting an ordinance that seizes on one of the omitted items as a basis for unilaterally increasing the contractors' costs. Allowing such unpredictable costs undermines the "anchoring purpose" of the Contract Clause, which is "'enabling individuals to order their personal and business affairs according to their particular needs and interests.'" *Romein*, 503 U.S. at 190 (quoting *Allied Structural Steel*, 438 U.S. at 245).

The majority's approach is also inconsistent with this Court's decisions regarding exercise of the police power. The

majority insisted that any agreement by Berkeley not to impose (during the term of the lease) increased wage and benefit requirements "would be void as against public policy." Pet. App. 19a. But this Court has never held that public policy requires that governments not be permitted to contract away, for a limited period, their right to impose increased monetary exactions on their citizens. Rather, the public policy requirement has been invoked to ensure that the police power is always available to protect public health and safety. *See, e.g., Northern Pacific Ry. Co. v. Minnesota,* 208 U.S. 583 (1908) (agreement between railroad and Minnesota that railroad has no obligation to maintain its bridges is unenforceable as against public policy). If Berkeley believes that the public welfare requires that lower-income workers receive higher salaries, there is nothing to prevent Berkeley from providing the funds itself if it is barred by contract from imposing those costs on an employer. *See Lipscomb,* 269 F.3d at 505 ("Purely financial obligations, however, do not surrender aspects of the State's sovereignty, and thus are subject to the Contract Clause.").

Finally, as Judge Bybee noted, the Contract Clause has long been viewed as codifying the "antiretroactivity principle." Pet. App. 54a (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994)). The Ninth Circuit majority's rejection of RUI's Contract Clause claim is inconsistent with that principle. Because it imposes a substantial financial obligation retroactively on one of Berkeley's lessees – and on the basis of circumstances unique to RUI, not on the basis of some generally applicable policy designed to remedy "broad, generalized economic or social problem[s]," *Allied Structural Steel*, 438 U.S. at 250 – the Marina Amendment "is not a valid exercise of police power" but rather "contravenes the Contract Clause." Pet. App. 55a.

In sum, the Court should grant review to resolve the conflict between the decision below and this Court's Contact Clause decisions.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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